No. 9668

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Brief of Appellant

Howard Toole
W. T. Boone
Attorneys for Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

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JURISDICTION

This is a consolidated appeal from two judgments entered in the District Court of the United States for the District of Montana, Great Falls Division, in two cases wherein the appellee, Ethel M. Doheny, as Administratrix, and a resident and citizen of the State of Montana, was plaintiff, and the appellant, United State Fidelity and Guaranty Company, a corporation, and a resident and citizen of the State Maryland, was defendant (R. 16, 39).

In each of the two cases the appellee seeks to recover from the appellant the sum of $5,116.89 which amount represents the amount of each of two judgments made and entered in her favor in the District Court of the Eighth Judicial District of the State of Montana, in and for Cascade County, in two actions entitled

> "Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm, name and style of Coverdale & Johnson, defendants, (R. 73) and
>
> "Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm, name and style of Coverdale & Johnson, defendants, (R. 75)."

The two causes, involved in this appeal, were originally filed in the District Court of the Eighth Judicial District of the State of Montana, in and for Cascade County, (R. 3, 26) and on petition and order were removed for trial to the United States District Court in

and for the District of Montana, Great Falls Division (R. 15, 24, 38, 47). The two cases were consolidated by the United States District Court for trial and were heard together as the pleadings were alike, the facts identical and the law applicable thereto, the same (R. 64). For those reasons the causes are here presented in a consolidated appeal.

The jurisdiction of the District Court of the United States is found in Section 41, Title 28, United States Codes Annotated, Section (1) (b); (Judicial Code, Section 24, as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states, where the amount in controversy exceeds the sum of $3000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Circuit Court of Appeals is found in Section 225, Title 28, United States Codes Annotated (first paragraph) Judicial Code, Section 128, as amended) wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the Supreme Court of the United States. No such direct appeal to the Supreme Court is permissable in these cases.

STATEMENT OF THE CASE

On December 12, 1934, Marguerite Doheny and Roberta Doheny, daughters of the appellee, while riding as guests in an automobile owned by E. O. Johnson, one of the members of the co-partnership of Coverdale

& Johnson, received personal injuries which caused their deaths as a result of an automobile accident which occurred at Simms, in Cascade County, Montana. Thereafter two actions were commenced by the appellee as the Administratrix of the Estate of Marguerite Doheny, Deceased, and Roberta Doheny, deceased, respectively, in the state court against Coverdale & Johnson, a co-partnership, in which actions appellee sought damages for personal injuries to and the death of Marguerite and Roberta Doheny. The trial of these two cases resulted in a verdict of $5000.00 in each case in favor of appellee and against Coverdale & Johnson (R. 73, 75). Both cases were appealed by Coverdale & Johnson to the Supreme Court of the State of Montana and both judgments were by the Supreme Court affirmed (R. 69). Execution was taken out against Coverdale & Johnson in each of the cases and was returned wholly unsatisfied (R. 72).

The two cases involved in this appeal are actions brought by appellee against the appellant, United States Fidelity and Guaranty Company, to recover the amount of each of the judgments, together with interest and costs, obtained by her in the state court against Coverdale & Johnson (R. 3 to 10 and 27 to 33). Appellee seeks in these actions to impose liability upon the appellant for the unsatisfied judgments against Coverdale & Johnson by reason of the fact that appellant had written a surety bond for and issued a Contractor's Public Liability Policy to the co-partnership in connec-

tion with the latter's written contract with the Montana State Highway Commission, which agreement was entered into on September 21, 1934 (R. 4 to 7 and 28 to 30). The contract provided for the construction by the contractor (Coverdale & Johnson) of certain improvements, consisting of one concrete and five treated timber pile bridges and stock passes on the Augusta-Sun River Road in Lewis and Clark County, Montana (R. 89).

As a condition precedent to the complete execution of this contract, the contractor was required by the terms of the contract to furnish a good and sufficient surety bond to be conditioned upon the faithful performance by it of the covenants and agreements contained in the contract (R. 98). The "contract bond" was executed on September 21, 1934, in favor of the State of Montana by Coverdale & Johnson, as principal, and the appellant, as surety (R. 100). The condition of the bond is as follows: (R. 101):

> "Now, Therefore, The Condition of this obligation is such that if the above bonded 'Principal' as Contractor shall in all respects faithfully perform all of the provisions of said contract, and his, their or its obligations thereunder including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner satisfactory to the State Highway Commission, complete the work contracted for, and shall save harmless the State of Montana, from any expense incurred through the failure of said Contractor to complete the work as

specified, or from any damages growing out of the carelessness of said Contractor or his, their, or its servants, or from any liability for payment of wages due or material furnished said Contractor, and shall well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under such contract, and all persons who shall supply him or the subcontractor with provisions, provender and supplies for the carrying on of the work, and also shall save and keep harmless the said State of Montana against and from all losses to it from any cause whatever including patent, trade-mark and copyright infringements, in the manner of constructing said section of work, then this obligation to be void or otherwise to be and remain in full force and virtue."

Section 7.11 of the contract specifications (R. 86) provided that "the contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work" and "shall submit adequate evidence to the Commission that he has taken out this insurance." At the time the contract was sent to Coverdale & Johnson, a letter was addressed by the Commission to the contractor (R. 110) which, among other things, directed the latter's attention to the above provision of the contract and as to the submission of "adequate evidence" stated "preferably, this information should be conveyed in the form of a letter to this Department from the insurance agent who furnishes you the policy."

On October 1, 1934 (ten days after the execution and delivery of the contract), a Contractor's Public

Liability Policy of insurance was written by the appellant through agent Bowman at Anaconda, Montana, to the contractor (R. 133 to 163) and on the same date the appellant by letter (R. 113) advised the Commission "we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934."

The Montana State Highway Commission, at least since 1929, has never prepared a form of Public Liability Insurance Policy for use by contractors and has never prescribed the terms of a policy such as was required by Section 7.11 of the contract specifications, and has never required contractors, including Coverdale & Johnson, to deliver the original or a copy of the policy of insurance to it (R. 115, 116).

The Contractor's Public Liability Policy so issued to the contractor by the appellant contains the following pertinent provisions:

> "*The Insuring Agreement.*
>
> "I. To settle and/or defend in the manner hereinafter set forth all claims resulting from liability imposed upon the Assured by law *for damages on account of bodily injuries, including death* at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period defined in Statement 2 *by any person or persons other than employees of the Assured, by reason of and during the progress of the work described in Statement 4 at the places named therein*

and elsewhere, if caused by employees of the Assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places, *except driving or using any vehicle or automobile or any draught animal or loading or unloading any such vehicle." (R. 133)*

"Exclusions.

"Condition A.

"This policy shall not cover loss from liability for, or any suit based on, injuries or death:

. . . .

"(3) *Caused by* any draught or driving animal or vehicle or *automobile owned or used by the Assured or any person employed by the Assured while engaged in the maintenance or use of same elsewhere* than upon the insured premises." (R. 136)

Endorsement entitled "Contractor's Public Liability Endorsement," attached to the policy extends the coverage to claims arising in connection with:

"1. Self-propelled contractor's equipment and appliances (except motorcycles, tractors, and automobiles, whether with or without mounted equipment or machinery) with or without towed equipment, while being moved under their own power between places covered by the Policy where the Assured is carrying on his operations;

"2. Road graders and road scrapers while being drawn by draught animals between places covered by the Policy where the Assured is carrying on his operations." (R. 154)

This endorsement also changes exclusion (3) of Condition A of the policy to read as follows (R. 154):

"This policy shall not cover loss from liability

for, or any suit based on, injuries or death:

. . . .

"Caused directly or indirectly by any draught or driving animal, any automboile, trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the Policy where the Assured is carrying on his operations."

The policy, by endorsement No. 8, was extended to cover operations described in the schedule of operations attached to the policy as applicable to that certain work designated as NRH-176 "E" Unit No. 2, being concrete and timber pile bridges on Augusta-Sun River Road, Lewis and Clark County, Montana. In the schedule referred to, the work is referred to as "being construction of concrete and timber pile bridges, Augusta-Sun River Road, Lewis and Clark County, Montana, . . . " (R 161)

The concrete and treated timber pile bridges, covered by the Highway Commission contract, were located on what is called the Augusta-Sun River Road in Lewis and Clark County, Montana. (R. 89) The automobile accident, reference to which has been previously made, occurred in the town of Simms in Cascade County, Montana. Of the bridges covered by the contract, the nearest one to the point of the accident was 12.3 miles. The other bridges were scattered from that 12-mile point to 22 miles distant from the point of the accident. There were five bridges under the Highway Commission contract and only one of the five bridges was un-

completed when the accident occurred, that being the one 22 miles distant from Simms, where the automobile accident took place. At the time of the accident the contractor was not working on that bridge, but was in fact working on bridges under another Highway Commission contract on what is known as the Augusta-Choteau Road at a point 28 miles from the location of the accident. (R. 131, 132, 173)

QUESTIONS PRESENTED

The questions presented in this consolidated appeal may be briefly stated as follows:

First. Do the unsatisfied state court judgments arising out of the automobile accident, under the pleadings and proof, come within the terms, provisions, insuring agreement and coverage of the Contractor's Public Liability Policy (Defendant's Exhibit 27) issued by the appellant to the contractor, Coverdale & Johnson?

Second. Whether there is any liability upon appellant under the contract performance bond (plaintiff's exhibit No. 2 on deposition) executed by appellant as surety, for the unsatisfied state court judgments against Coverdale & Johnson?

Third. Whether, in the interpretation of the said Contractor's Public Liability Policy, it was proper to resort to extrinsic evidence, such as the contract between the contractor and the State Highway Commission, and the contract performance bond to the end of

holding the exclusion provisions of the said Contractor's Public Liability Policy inoperative, when (a) the Contractor's Public Liability Policy is admittedly a clear, concise and unambiguous contract and (b) when the contract between the contractor and the State Highway Commission, and the contract performance bond, and the Contractor's Public Liability Policy are not contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction?

Fourth. When there is no pleading seeking a reformation of the policy and no pleading or evidence of mistake, fraud or ambiguity in connection therewith, was it proper for the trial court to reform the policy?

SPECIFICATIONS OF ERROR

1. Because there was no sufficient evidence in the record, the trial court erred in making its finding of fact No. V in each of the cases as follows (R. 188, 196):

> "That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement . . ."

2. Because the Contractor's Public Liability Policy (Defendant's Exhibit 27) was a clear, concise and unambiguous contract of insurance and because the instruments with which it was construed, namely, the contract between Coverdale & Johnson and the Montana State Highway Commission, and the contract performance bond (Plaintiff's Exhibits 1 and 2 on deposition), were not contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, the trial court erred in making its finding of fact No. VIII in each of the cases, as follows (R. 190, 198):

> "The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

3. Because there is no pleading seeking a reformation of the Contractor's Public Liability Policy (Defendant's Exhibit 27), and because there is no pleading or proof of mistake, fraud or ambiguity, the trial

court erred in making a reformation of said policy and in holding, in the opinion of the court, as follows (R. 184):

> "Under the construction given the policy reading it as one with the contract and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event."

4. The trial court erred in admitting Plaintiff's Exhibit No. 1 on deposition (R. 81-99) said exhibit No. 1 on deposition being the contract between the State Highway Commission and Coverdale & Johnson for the construction of certain highway bridges, over the objection of the appellant, as follows:

> "Mr. McCabe: Offer in evidence plaintiff's exhibit 1 as a part of the testimony of this witness.
>
> "Mr. Boone: To which the defendant objects on the ground that the instrument has not been properly identified; further as incompetent, irrelevant and immaterial, having no bearing upon the issues in this case. And further objection that the offer of the exhibit is an attempt on the part of the plaintiff to vary the terms of a certain policy of insurance, which is the subject of this action.
>
> "The Court: Are these standard specifications, and do they relate particularly to this contract?
>
> "Mr. McCabe: Yes.
>
> "The Court: Overrule the objection."

5. The trial court erred in admitting Plaintiff's Exhibit No. 2 on deposition (R. 99-102), said exhibit being the contract performance bond furnished by appellant

to Coverdale & Johnson to guarantee the faithful performance of the contract for the construction of the highway bridges, over the objection of the defendant, as follows:

> "The Witness: The Contract Bond, marked as plaintiff's exhibit 2, is the bond I have heretofore testified to as being annexed to the document marked plaintiff's exhibit 1.
>
> "Mr. McCabe: We offer plaintiff's exhibits 1 and 2 as a part of the testimony of this witness.
>
> "Mr. Boone: To which the defendant objects in that the plaintiff's exhibit has not been properly authenticated and on the further ground that the exhibit is incompetent, irrelevant and immaterial, and has no bearing on the issues in this case; on the further ground it is an attempt on the part of the plaintiff to vary the terms of a certain insurance policy executed to John M. Coverdale and E. O. Johnson, which insurance policy is the subject of this action.
>
> "The Court: Overrule the objection."

6. The trial court erred in admitting Plaintiff's Exhibit No. 3 on deposition (R. 110, 111), said exhibit being a letter from the State Highway Commission to the contractor wherein reference is made to the contract (Plaintiff's Exhibit 1 on deposition), the performance bond (Plaintiff's Exhibit 2 on deposition), and also referring to the provision in the contract relative to liability insurance, over the objection of the appellant, as follows:

> "Mr. McCabe: Plaintiff's exhibit No. 3 is offered in evidence.

"Mr. Boone: To which the defendant objects on the ground that it is incompetent, irrelevant and immaterial; that the exhibit constitutes a self-serving declaration and on the further ground that no communications, such as plaintiff's exhibit 3, between State Highway Commission and Coverdale & Johnson are binding upon the defendant, and upon the further ground no proper foundation has been laid for the introduction of the exhibit.

"The Court: Overrule the objection."

7. The trial court erred in admitting Plaintiff's Exhibit No. 4 on deposition (R. 113, 114), said exhibit being a letter from appellant to the State Highway Commission referring to the Contractor's Public Liability Policy (Defendant's Exhibit No. 27), over the objection of appellant, as follows:

"Mr. McCabe: Plaintiff's exhibit 4 is offered in evidence.

"Mr. Boone: This is objected to on the ground the instrument has not been properly authenticated; on the further ground no proper foundation has been laid for the admission of the exhibit in evidence and on the further ground it is incompetent, irrelevant and immaterial, not serving or having any bearing on the issues in this case.

"The Court: Objection overruled."

8. The trial court erred in making its conclusion of law No. 1 in each of the cases, as follows: (R. 192, 199)

"That the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, (Marguerite Doheny) deceased, is entitled to the judgment of the above entitled Court in the above en-

titled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents ($5,116.89), together with interest on said sum from May 4, 1936 until paid at the rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action."

9. The trial court erred in denying the appellant's motion to dismiss the complaint in each of the cases, said motion being made upon the ground that the complaint fails to state a claim upon which relief can be granted. (R. 50, 51)

10. The trial court erred in denying, in each of the cases, the appellant's motion to strike a certain part of paragraph III of the complaint, relating to the contract performance bond, said motion being upon the ground that said part of paragraph III was redundant, immaterial, impertinent and surplusage. (R. 52, 53)

11. The trial court erred in entering judgment in favor of the plaintiff and appellee and against the defendant and appellant in each of the cases (R. 200, 202)

ARGUMENT

A. Summary.

Admittedly the Contractor's Public Liability Policy involved in these cases is a clear and unambiguous contract of insurance. That fact was recognized by the trial court in its opinion and no issue to the contrary was raised in the pleadings by appellee. The trial

court also recognized, and we believe the appellee concedes, that if the exclusion provisions of the policy are operative, then the automobile accident and the resulting unsatisfied state court judgments against the insured contractor fall within the exclusions and no recovery under the policy can be had. (R. 181, 182, 184.) The policy exclusions very specifically provide that (R. 154, 155).

> "This policy shall not cover loss from liability for, or any suit based on, injuries or death: . . . .
>
> "Caused directly or indirectly by any . . . . . automobile . . . . . elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations."

The operations referred to in the policy were the five concrete and treated timber pile bridges located from 12 to 22 miles away from where the automobile accident resulting in the deaths of Marguerite and Roberta Doheny occurred. (R. 131).

The appellant contends that the appelle's proof in these cases is insufficient to bring the unsatisfied state court judgments within the terms and provisions of the Contractor's Public Liability Policy.

It is impossible to ascertain from the opinion of the trial court and from its findings of fact and conclusions of law on what basis liability was imposed upon appellant; that is, whether the liability decreed was upon the basis of appellant having executed the surety bond to the State of Montana on behalf of the contractor, or

whether liability was predicated upon the Contractor's Public Liability Policy, the exclusion provisions of same being held inoperative, when the policy was construed together with the Highway Commission contract and the contract performance bond.

The appellant contends that there is no independent liability upon it for the unsatisfied state court judgments by having executed the contract performance bond, inasmuch as the bond was a statutory bond which, viewed in the light of its terms and conditions and the terms and conditions of the highway contract, did not require either the contractor or the surety to pay for any damages suffered by members of the public through the contractor's negligence.

If, on the other hand, liability was decreed upon the policy after being construed together with the highway contract and the contract performance bond, the appellant contends that it was improper for the trial court to construe the three instruments together because they were not between the same parties, relating to the same matters, and made as parts of substantially one transaction.

Furthermore the appellant contends that there being no pleading of fraud, or mistake, or ambiguity and no proof of such, the trial court nevertheless in effect reformed the Contractor's Public Liability Policy so as to delete therefrom the exclusion provisions within which the accident and the resulting unsatisfied state court judgments properly fell.

1. The Contract Performance Bond.

In this state, by Section 5668.41, Revised Codes of Montana, 1935, any public body or commission in contracting with any person or corporation to do any work for the state shall require that person or corporation to execute and deliver a good and sufficient surety bond "conditioned that such corporation, person or persons shall faithfully perform all of the provisions of such contract, and pay all laborers, mechanics, subcontractors and material men, and all persons who shall supply such corporation, person or persons, or subcontractors with provisions, provender, material or supplies for the carrying on of such work." Thus the contract performance bond involved in these cases is clearly a statutory bond.

The highway construction contract and the performance bond were both executed on September 21, 1934, (R. 89, 100) and as is stated in the formal contract itself the contractor was required to furnish the surety bond as "a condition precedent to the complete execution of this contract." (R. 98). There is no statute in Montana requiring liability insurance on public works nor does the statute requiring the performance bond in such cases make any mention of liability insurance. It is evident from the fact of the public liability policy having been executed ten days after the contract bond, and from the very terms of the contract itself, that the requirement that public liability insurance be

obtained by the contractor was not a condition precedent to the execution of the contract.

It may be argued by the appellee that by reason of the provision (R. 101) in the contract bond by Coverdale & Johnson and appellant to the State of Montana "that the principal would 'in all respects faithfully perform all of the provisions of said contract and his, their or its obligations thereto, including the specifications therein referred to and made a part thereof,' " the appellant, as surety, became obligated co-extensively with the contractor to comply with the provisions of specification 7.11 of the contract (R. 86) to the effect that "the contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on of the work."

The Montana Supreme Court expressly adopted, in the case of *Gary Hay & Grain Company vs. Carlson,* 79 Mont. 111 ,123; 255 Pac. 722, 725, the following general rule of suretyship:

> "The obligation of the surety is . . . . . co-extensive with and measured by the promises of the principal (the contractor) to the obligee (the State) appearing in the contract, provided proper expressions are used in the bond, and the surety by the bond binds itself only to the performance of those acts which the principal promises to perform as a part of his contract."

See also *Federal Surety Company vs. Basin. Construction Company,* 91 Mont. 114, 126; 5 Pac. (2d) 775.

It must be born in mind that the construction con-

tract in this case does not bind the contractor Coverdale & Johnson to "pay" for any injuries sustained through its negligence. Consequently, the appellant surety cannot be held bound to pay for such injuries since under the above cited cases the surety's obligation is coextensive with and measured by the promises of the principal to the obligee appearing in the contract and the surety by the performance bond binds itself only to the performance of those acts which the principal promises to perform as a part of his contract.

Marguerite and Roberta Doheny were not parties to the construction agreement nor were the highway contract and performance bond executed for their benefit. They were strangers to both the highway agreement and the performance bond and even though the contract and bond contain some reference to the class to which they belonged, they cannot recover from the appellant as surety for the contractor's failure to discharge a duty, here to provide liability insurance in the language of the highway agreement, because there is no specific promise on the part of the surety in the bond to pay members of that class for personal injuries.

This principle was very clearly established by *National Surety Company of New York vs. Ulmen,* 68 Fed. (2d) 330, (certiorari denied 78 L. Ed. 1479) which was a decision from the Circuit Court of Appeals, Ninth Circuit, upon review of a decision of the United States District Court for the District of Montana. In that case George Ulmen, the plaintiff, had previously com-

menced an action in the state court of Montana against R. A. Schwieger, a contractor, to recover damages for personal injuries sustained by reason of the contractor's negligence in failing to provide necessary barricades, lights and warnings, during the construction of a project under contract with the State Highway Commission of the State of Montana. He recovered judgment in the state court for $10,000.00 and then commenced this action against the National Surety Company of New York, who was the contractor's surety under the construction contract, and the plaintiff contended that by reason of the specifications in the contract which require the contractor to provide necessary barricades, lights, warnings, danger signals, etc., and by reason of the provision in the bond executed by the defendant "the condition of this obligation is such that if the bounden 'principal' as contractor shall in all respects comply with the terms of the contract," the defendant was obligated to pay the judgment recovered by Ulmen in the state court. The bond in the Ulmen case is identical with the bond involved in these cases.

The Circuit Court held that the defendant surety was not liable to pay the unsatisfied judgment against the contractor basing its decision on the ground that the surety bond, and the contract, contained no provision for payment, either by the contractor or his surety for any damages suffered by members of the public through the contractor's failure to erect and maintain proper signs. The Montana decisions are reviewed at length

in the court's decision, and the holding of the court is as follows:

> *"In view of the foregoing decisions of the Supreme Court of Montana, it is our view that, in that state, a third person who is a stranger to a contract or a bond thereunder, cannot recover from the surety even when the contract and bond, as here, contain some reference to him or to the class to which he belongs, unless there is a specific promise to pay such third person or such class, contained in the contract and bond. The mere statement of a duty to be discharged by the contractor, which may incidentally benefit a third party or class to which the latter belongs, without more, does not make the surety liable to such third person for the contractor's failure to discharge that duty."*

The status of the Doheny girls as to the highway agreement and the performance bond in these cases is identical to the status of Ulmen to the highway contract and bond in the National Surety Company case. Further applying the Ulmen decision to the cases at bar it is apparent that while the contract in the cases at bar, required the contractor to "carry public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work" there is no provision in the contract or the bond requiring either the contractor or the appellant, as surety, to pay damages suffered by the public through the contractor's negligence, and it is further apparent that while the Doheny girls were of a class mentioned or referred to in the contract, they were nevertheless strangers to it and cannot maintain an action to recover against the

appellant, as surety, if there was any failure on the part of the contractor to provide such insurance as was required by the contract. This would even be true in the event the contractor did not provide any form or type of public liability insurance.

This principle is further illustrated in the case of *Schisel vs. Marvill,* 197 N. W. 622 (Iowa). This was an action on a contractor's bond by Schisel who was not a party to either the contract or the bond, to recover damages for personal injuries resulting from the negligent acts of the contractor's employees. The bond in that case was similar to the bond in the cases at bar and the contract required the contractor to "carry liability insurance to indemnify the public for injuries sustained by reason of the carrying on of his work, and to meet the requirements of the Iowa Workmen's Compensation law." The contractor did not furnish the liability insurance and the plaintiff asserted that this constituted a breach of his contract and that his surety therefore became liable. The court held that liability could not be predicated on the statutory bond and that by the terms of the bond claims for damages for personal injuries suffered by third persons were not contemplated. The holding of the court is as follows:

> "Section B-43 is broad in its scope. The contractor purports thereby to 'assume all responsibility for damages,' and to 'indemnify and save harmless' the county and its officers and agents from all claims of any character for damages in consequence

of any neglect or misconduct of such contractor; and to carry liability insurance to indemnify the public for injuries sustained by reason of the carrying on of his work, and to meet the requirements of the Iowa Workmen's Compensation Law. There is no other like provision to be found either in the statute, in the contract, in the bond, or in the specifications herein. The contractor agrees to 'indemnify the public for injuries.' The method of indemnity is expressly specified as 'liability insurance.' Without doubt, the liability insurance referred to herein has no reference whatever to the bond in suit, which has been repeatedly designated by all the parties as a performance bond only. The argument for appellant at this point is that the contractor did not furnish liability insurance, and he thereby breached his contract, and that because of the breach of his contract the surety on the performance bond became liable. It is argued also that, if the contractor is liable under any provision of the contract or specifications, then the question as to whether there was one bond or two would be immaterial and that the surety on either could be held liable. The argument is not sound. The failure to take out liability insurance was not a breach of the contract in any legal sense. It was a condition precedent to the acceptance of his bid by the board of supervisors and to the approval of the contract by the highway commission. The bid was accepted and the contract was approved without requiring liability insurance. The statute did not require such an undertaking. If the board of supervisors and the highway commission had power nevertheless to require it as a condition to the approval of the contract, they had equal power to waive it. The undertaking of this section B-43 resolves itself into two parts: (1) to 'indemnify and save harmless the state and county from all

suits,' etc. (2) To 'carry liability insurance to indemnify the public for injuries,' etc.

"If the contractor had obtained liability insurance pursuant to this provision, would the plaintiff still claim that he had a right to elect to proceed against the surety on the other bond? Liability insurance is not a suretyship. The liability created by it is a primary one and not a secondary; whereas the liability of a surety on a bond is secondary and not primary. The question at this point is not whether the contractor is primarily liable to this plaintiff. We are assuming that he is. The question is whether the surety on his bond is liable beyond the terms of the bond, because the contractor failed to carry liability insurance, and because the public authorities permitted the contract to go into effect without such liability insurance. It is enough at this point to say that, inasmuch as the requirements of section B-43 are not statutory, and inasmuch as the bond signed by the surety was a statutory bond, liability thereunder cannot be extended beyond the statutory requirements. This conclusion is inevitable from the plain terms of all the provisions of the contract and bond and specifications, save only section B-43. It is also significant that the final section of the specifications being B-71 repeats the former enumeration of the kind of liability chargeable to this bond. These repeated enumerations as contained in statute and bond and specifications would have to be wholly ignored as defining the scope of the liability of the bond in order to hold that the plaintiff's claim was within its contemplation. Whether the public officials could exact a valid common-law bond to indemnify the public against such damages as are herein involved is a question upon which we do not pass."

Thus it is respectfully submitted that under the *Ulmen* and *Schisel* decisions the appellant is not liable for the unsatisfied Doheny judgments by reason of having executed the surety bond for the contractor, Coverdale & Johnson.

2. Construction of Contractor's Public Liability Policy.

The Montana Supreme Court has repeatedly held that contracts of insurance are to be construed as any other contracts and with a view of carrying out the intention of the parties.

> McCauley vs. Casualty Company of America, 39 Mont. 185, 102 Pac. 586
> Stevens vs. Steck, et al. 101 Mont. 569, 55 Pac. (2d) 7.

The rules for the interpretation of contracts in this jurisdiction are found in Chapter 108, Revised Codes of Montana, 1935, of which the following have a bearing upon the cases at bar:

Section 7529, R.C.M., 1935 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."

Section 7530, R.C.M., 1935, provides:

> "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

Under the above statutes it has often been held that

if a contract is plain and unambiguous it needs no construction and it is then the duty of the court to enforce it as made by the parties.

Bullard vs. Smith, 28 Mont. 387, 72 Pac. 761
Frank vs. Butte and Boulder Mining & Lumber Company, 48 Mont. 83, 135 Pac. 904
Union Central Life Insurance Company vs. Jensen, 74 Mont. 70, 237 Pac. 518

It has further been held that when the language employed by the parties is free from ambiguity and uncertainty it is beyond the power of the court to enlarge or restrict its application or meaning and that courts must enforce contracts as made, not make new ones for the parties, no matter how unreasonable the terms may appear.

McDaniel vs. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582, 584
McConnell vs. Blackley, 66 Mont. 510, 214 Pac. 64

It next becomes important to determine whether the law requires that the Contractor's Public Liability Policy be construed together with the construction contract and the performance bond. In this connection the appellee, in the court below, insisted that the wording of the contract, as well as the law, required such a construction and the trial court's attention was directed by appellee and much reliance placed upon the same by the court in its opinion (R. 182) to the provision in the contract "all things contained herein together with 'advertisement for proposals' or 'notice to contractors'

and the 'contract bond' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these specifications and contract and are to be considered one instrument." (R. 82)

In the opinion of the trial court the above provision was quoted and the trial court concluded that the language "any and all supplemental agreements made or to be made' 'would necessarily include the Contractor's Public Liability Policy (R. 182) which, according to the opinion and to the court's findings of fact, should be and was construed with the highway contract and the contract performance bond with the result that the exclusion provisions of the policy were held to be inoperative. (R. 190, 198)

If a careful examination of the contract is made it is clearly evident that the words "any and all supplemental agreements" refer not to the public liability policy of insurance, but rather to supplemental agreements between the Montana State Highway Commission and the contractor in regard to the completion of the construction work in an acceptable fashion. It is a matter of common knowledge that changes in plans are often made during the course of construction which necessitate increasing or decreasing quantities and thus require supplemental agreements between the contractor and the owner relative thereto. This is evidenced by specification 4.3 (R. 84) which provides for the making of such supplemental agreements whenever "altera-

tions involve (1) an increase or decrease of more than 25 per cent of the total cost of the work calculated from the original proposal quantities and the contract unit prices, or (2) an increase of 25 per cent in the quantity of any one major contract item." This position is further substantiated by paragraph 9.4 of the contract specifications (R. 87) which provide that extra work shall be paid for either at agreed unit prices under the provisions of a "supplemental agreement" or on a "force account" basis. That paragraph likewise defines a "supplemental agreement" and provides that such an agreement is to be prepared whenever it has been agreed to perform extra work not contemplated in the original proposal and contract and "This supplemental agreement" shall be executed by both of the parties to the original contract, shall thereupon be considered a part of the contract, and payment for the work included therein shall be for the actual quantity performed at the agreed unit prices set forth therein. Extra work provided for by a "supplemental agreement" shall not be started until after the execution of the said agreement." (R. 88).

Therefore we submit that from the very language of the contract documents there was no intention on the part of the contractor or the State of Montana to make the policy of insurance one of the contract documents.

Does the law permit that the Contractor's Public Liability Policy issued by the appellant to the con-

tractor be construed together with the contract and the contract performance bond? The Montana statute on this subject is Section 7533, Revised Codes of Montana, 1935, which provides:

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

This statute definitely requires, before contracts can be construed together, that they be between the same parties, relate to the same matters and made as parts of substantially one transaction. It should here be noted that the construction contract (R. 89) between Coverdale & Johnson and the State of Montana was executed and delivered on September 21, 1934, and was a contract to which the appellant was not a party. The contract performance bond (R. 99) was executed by the contractor, as principal, and appellant, as surety, in favor of the State of Montana on September 21, 1934. The public liability policy of insurance (R. 123-163) involved in these cases was executed by appellant to the contractor under date of October 1, 1934. Thus the construction contract and the Contractor's Public Liability Policy are between two different parties and were not executed contemporaneously but rather ten days apart and they very clearly do not constitute one transaction.

The general rule on this subject in this jurisdiction is stated in *Union Bank & Trust Company vs. Himmelbauer,* 57 Mont. 438, 188 Pac. 940, which general rule is:

> "Where two or more contracts relate to the same subject matter and were executed at the same time they could not be considered as one contract unless they were executed by the same parties."

Applying the above rules to the facts in the cases at bar it must be observed (1) that the construction contract was between Coverdale & Johnson and the State of Montana and relates to the construction of bridges whereas the Public Liability Insurance Policy was between the appellant and Coverdale & Johnson and relates to indemnity promised the latter at certain definite locations and under certain definite conditions; (2) that the contracts are not between the same parties; (3) that the contracts were not executed or delivered at the same time.

An illustrative case on this question is *State Bank of Darby vs. Pew, et al,* 59 Mont. 144, 195 Pac. 852, wherein the contractor Pew, by written contract, obligated himself to construct a water tight basement under a certain bank building to be constructed by him, as contractor. The building specifications, forming a part of the contract, described the mode of construction, and in addition required that the contractor "shall, upon receiving the final payment for this work, deliver to the owner a written and signed guaranty that the foundation shall be water tight for a period of one year from the date of final acceptance and furnish a

surety bond for $1000.00 to accomplish the guaranty, if required." A surety bond was furnished about a month after the execution of the contract and about one week later than the performance bond accompanying the building contract. The surety bond was given as a guarantee of a water tight basement. The basement was not water tight and the action was brought by the owner for damages. The contractor and the surety claimed that they were relieved from responsibility because the contractor had complied with the plans and specifications and they urged that the bond must be construed together with the contract, specifications and the performance bond. *The court held, however, that the bond was an independent and distinct contractual obligation and, irrespective of having been required by the specifications, it was not to be construed with the original contract.* The following quotation is from the court's decision (page 154):

> "The bond herein involved was executed nearly a month after the building contract had been entered into, and one week later than the bond furnished by the contractor for the complete performance of the building contract. Futhermore, after the basement had been entirely completed, as will be noted, the bond was extended for an additional term. There is no reference, in the bond covering the water-tight construction of the basement, to the specifications, and the only connection with the building contract by way of recital therein is that it is executed pursuant to guaranty required in the building contract."

Apply the reasoning of the *Pew* case to the cases at bar, the policy of insurance was executed ten days after the contract, there was no reference in the policy to the contract specifications respecting insurance and the only connection between the policy and the contract was the recital in the contract that the contractor should carry public liability insurance. Consequently the policy is clearly an independent and distinct transaction.

A case closely analogous to the situation in the cases at bar is *Michigan Stamping Company vs. Michigan Employees Casualty Company,* 209 N. W. 104 (Mich.) in which the owner of a building to which it contemplated repairs, hired the contractor to do the work. The contract contained the following provisions:

> "The general contractor shall, during the continuance of the work under this contract, also extra work in connection therewith, maintain liability insurance in a sufficient amount to protect himself and the owner from any liability or damage for injury to any of his employees or other persons, including any liability or damage which may arise by virtue of any statute or law now in force or which may hereafter be enacted and shall secure and protect the owner from any liability or damage whatsoever for any injury to persons or property."

The contractor entered into negotiations for a policy with an agent of the defendant insurance company *giving the agent a copy of the contract showing the insurance requirements.* The policy when issued contained the following exclusion:

> "This policy shall not cover loss or expense on account of accident caused or suffered by any employee or employees of the assured engaged on work covered by this bond or in connection with the same . . ."

There was an accident resulting in the death of an employee of the subcontractor just before the policy form was sent to the contractor and another accident in which an employee of another subcontractor lost his left hand a few weeks later. The plaintiff made settlements on both accidents and brought this action to recover the sums so expended. The defendant denied any liability on the policy and the court sustained its position.

The court held that the language of the insurance policy was not ambiguous and refused to read into the policy any provisions not contained therein and refused a reformation. In part the court said:

> "There is no ambiguity in the language of the instrument. It was the duty of the court to place a legal interpretation upon it. As construed by the trial court and by this court, plaintiff has no right of action thereunder against the defendant on the facts presented. The practical construction which the parties put upon the contract may be considered only in cases where the language of the instrument may be said to be ambiguous or uncer-

tain. Finnegan v. Worden-Allen Co., 201 Mich. 445, 167 N. W. 930; Zilwaukee Township v. Saginaw-Bay City Ry. Co., 213 Mich. 61, 181 N. W. 37.

"By its claim of estoppel the plaintiff seeks to have the court read into the policy provisions relating to the liability of the defendant not contained therein, or, in other word, to reform the contract in accord with the agreement of the parties at the time the application for insurance was made. The defendant is not here asserting rights under its contract. It simply denies liability thereunder. The burden is on the plaintiff to establish such liability.

"There is a clear distinction between the effect of an omission in a policy which the insurer relies on to defeat the action and one which the insured seeks to have incorporated therein as a basis for recovery. As to the former this court has held that the neglect of the insurer to insert a provision of which its agent was informed at the time of application for insurance was made is, in legal effect, a waiver, and estops it from insisting that its omission constitutes a legal defense to an action on the policy. Gristock v. Insurance Co., 87 Mich. 428, 49 N. W. 634; Simpson v. Insurance Co., 184 Mich. 547, 151 N. W. 610. As to the latter we are of the opinion that the policy must be reformed in order for the insured to obtain the benefit of such an omission.

"The indemnity promised by the insurer, as expressed in the written contract, may not be enlarged by proof of intention."

In *State vs. American Surety Company of New York,* 78 Mont. 504, 255 Pac. 1063, it was held that the rule that more than one contract relating to the same

subject matter, between the same parties, and made as parts of substantially one transaction, must be construed together, has no application in an action on a surety bond conditioned to pay the amount found to be due under the terms of a contract for the sale of state timber if the buyer failed to pay, the parties not being the same and the obligations thereunder being entirely separate and distinct.

Accordingly we submit that the trial court was in error in construing the Contractor's Public Liability Policy with the highway contract and the contract performance bond. The policy should have been construed without reference whatsoever to those other instruments.

At this point it is pertinent to note that the liability of the contractor for injuries to or the death of members of the public occasioned through its negligence was neither greater nor less nor different because of its contract with the State of Montana. Irrespective of the provisions of the contract, it was incumbent upon the appellee, to secure a judgment against the contractor, to prove the essential elements of her causes of action, namely a legal duty, a breach of that duty and damage proximately resulting from such breach.

The State of Montana was naturally interested in providing protection and security to the members of the public who were injured or killed through the negligence of the contractor in the construction of the improvements contemplated by the contract. That in-

tention was evidenced by specification 7.11 of the contract (R. 86) which required the contractor to carry public liability insurance. From the very terms of the contract documents, it is clear that the Highway Commission intended that the public be protected from accidents occurring as a result of defects in the highway at the places and by reason of the improvements being made; or from any negligence created by the construction work; or from the negligent operation of equipment at the places where the stock-passes and bridges were being constructed. The State of Montana clearly had no intention to provide protection to persons injured or killed through the contractor's negligence in the operation of automobiles on the public highways 20 to 30 miles away from the construction work in a traffic accident, any more than did the State of Montana intend that protection be secured for persons injured or killed in the State of New York through the negligent operation of the contractor's private automobile. In other words we believe the common understanding of the language of the entire contract can only lead to the conclusion that the words "carrying on of the work" mean the actual work and labor in the construction of the improvements covered by the contract and not the negligent operation of automobiles many miles away from the job. And it must not be forgotten that the State Highway Commission did neither prescribe the form of the policy nor the terms nor conditions which it should contain. (R. 116) It did

not even require that the original or a copy of the policy be delivered to it (R. 115), but left the contractor and the insurance company from which it would obtain the indemnity free to contract as to what the terms and conditions of the policy should be. There is no requirement in the Montana statutes that a public contractor on public works should provide any liability insurance.

And it should further be noted here that a standard form of contractor's public liability insurance policy was obtained by the contractor from the appellant which, by its very terms, provided indemnity to the contractor "for damages on account of bodily injuries, including death . . . . . by any person or persons other than the employees of the assured, by reason of and during the progress of the work described in statement 4 at the places named therein." (R. 133). The exclusion of the policy provides that the policy shall not cover loss from liability "caused directly or indirectly by . . . . . automobiles . . . . . elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R. 154). Those places were at various points from 12 to 22 miles distant from where the automobile accident resulting in the deaths of Marguerite and Roberta Doheny occurred (R. 131).

This policy provides complete and absolute indemnity for all liability imposed on the contractor by law for injuries and death resulting by reason of and during

the progress of the construction work where the bridges and stock-passes were being constructed, and in addition thereto for accidents occurring at other places under limited conditions. We earnestly believe that the insurance obtained by the contractor fully met the intentions of the State Highway Commission.

By express statute in Montana it is valid for an exclusion to be placed in a contract of insurance. This is clearly stated in Section 8140, R.C.M., 1935, which provides:

> "Where a peril is especially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

There was no proof in this case, and no contention raised by the appellee, that the contractor did not obtain the type of insurance which he requested from the appellant; nor is there any proof of any mutual mistake.

3. Ambiguity.

There was no issue raised in the court below in these cases that the Contractor's Public Liability Policy was ambiguous in any respect. In fact the contrary was true and the trial court recognized that the exclusion provisions of the policy, if operative, would clearly defeat recovery. We therefore do not propose to extend this brief with any discussion or authorities dealing with the so-called "ambiguity" cases concerning insurance policies.

4. Sufficiency of the Evidence.

The appellee, being the plaintiff in the court below, had the burden of proof and to bring the unsatisfied state court judgments within the policy for her recovery, it was essential that she prove by a preponderance of the evidence that the automobile accident resulting in the deaths of Marguerite Doheny and Roberta Doheny, came within the coverage of the public liability policy, i.e., "by reason of and during the progress of the work" where the bridges and stock-passes were being constructed, (R. 133) and not "caused directly or indirectly by . . . . . any automobile elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R. 154).

This burden the appellee wholly failed to carry. She introduced no oral evidence in these cases to prove that the accident occurred by reason of and during the progress of the work within the terms of the policy and for her proof on this issue, she relied entirely upon the pleadings, evidence, instructions and judgments in the state court actions which were exhibits 1 to 25 inclusive which are not contained in this record on appeal, except the two judgments, Exhibits 9 and 21. (R. 73, 75). Those exhibits were only material or competent in these cases to disclose the issues determined in the state court actions as the state court judgments are res adjudicata as to the appellant only as to the issues there determined. 36 C. J., Sec. 121, p. 1121. Those issues were: First, the Doheny girls were

guests of the partnership, Coverdale & Johnson; second, that the partner Johnson and the employee Bardon, at the time of the accident, were engaged in partnership business; third, that Bardon was grossly negligent in the operation of the automobile and that such gross negligence proximately caused the deaths of the Doheny girls. That these were the issues can be determined from the reported decision of the state court cases; Doheny vs. Coverdale 104 Mont. 534; 68 Pac. (2d) 142.

Thus it will be observed that in the state court it was not necessary that the appellee prove that Coverdale & Johnson, the defendants therein, "by reason of and during the progress of the work" described in the policy at certain designated places, committed grossly negligent acts proximately causing the deaths of the Doheny girls, but rather that the partner Johnson and the employee Bardon were, at the time of the commission of such acts, engaged in partnership business.

The only evidence in these cases, bearing upon this very important issue is that offered by the defendant, which conclusively establishes that the automobile accident occurred 12 to 22 miles distant from the location of the bridges and stock-passes contemplated by the highway agreement, and in fact that the automobile accident occurred in a different county. This evidence further discloses that no work was being performed on those bridges or stock-passes at or near the day of the accident. Thus the appellant's evidence,

standing uncontradicted in the record, clearly establishes that the automobile accident was outside of the coverage of the insuring agreement of the policy and in fact within the exclusion provisions of the policy. (R. 131, 171, 172, 173).

Thus we respectfully submit that the appellee has failed to prove the essential elements of her complaint.

5. Reformation.

The trial court, in its written opinion, in effect reformed the policy, even though there were no pleadings nor prayer seeking a reformation. The pleadings in these cases contain absolutely no suggestion of a cause in reformation; there were no allegations in the complaint setting forth facts sufficient to warrant a reformation. It has been almost universally held by courts that a reformation of an instrument is never made by a court unless a proper case is made by the pleadings. This rule is stated in 53 Corpus Juris, Section 166, page 1012, as follows:

> "The general rules regulating the pleading of a case in equity govern the pleading of a cause in reformation of an instrument. The power to reform instruments, it is said, is exercised by courts of equity with great caution, and never unless a proper case is made by the pleadings. The material facts constituting the cause of action should be set forth in clear, concise, and distinct language, and great particularity of averment is required; thus, great particularity of averment is required to authorize the reformation of a mortgage, or other written contract, or of a description of land in an instrument, or of a deed for mistake. And

at all times the allegations should be specific, and not general."

A general statement as to the material allegations required to plead a cause in reformation is in 53 Corpus Juris, Section 166, page 1012, wherein the rule is stated:

> "In order to make out a good cause of action, the pleading seeking reformation of an instrument should allege or show every element necessary to entitle complainant to equitable relief, including the particular elements hereinafter separately discussed, in particular the instrument as actually made, and as intended and the grounds for reformation. It should be made to appear in the pleading that the pleader has some title or interest to be subserved or protected by the reformation; thus, if the allegations of the pleading show that the pleader has no right to maintain a suit either as the instrument was executed or as he seeks to have it reformed, it is subject to general demurrer. A party whose name is not mentioned in an instrument cannot maintain suit, if his complaint does not connect him with the parties to it."

Furthermore there is not a scintilla of evidence to support a claim of reformation even if such claim had been properly pleaded. There is no suggestion of mutual mistake, fraud or ambiguity. In cases for reformation of instruments, the law requires that courts should exercise great caution and require even a higher degree of proof of the grounds for reformation than in the average civil suit. This rule is clearly stated in 53 Corpus Juris, Section 199, page 1030, as follows:

> "While there are cases holding that, as in other civil cases, a preponderance of the evidence may be

> sufficient to warrant reformation of an instrument, it is generally held that a mere preponderance of the evidence is insufficient, that the courts should exercise great caution and require a high degree of proof, and that, because of the strong presumption that the terms of a written instrument correctly express the intention of the parties to it, mistake or fraud, when urged as a ground for reformation of an instrument, must be established by evidence that is clear, convincing, and satisfactory."

The Montana court has expressed the same rule in *Evankovich vs. Howard Pierce, Inc.,* 91 Mont. 344, 8 Pac. (2d) 653, as follows:

> "It is true that, in order to reform a contract, the evidence of the mistake must be clear, convincing, and satisfactory (Parchen v. Chessman, 53 Mont. 430, 164 Pac. 531; Humble v. St. John, 72 Mont. 519, 234 Pac. 475) . . . . ."

In each complaint, in paragraph VIII thereof (R. 9, 32), appellee alleged that the "co-partners had fully complied with all of the requirements and conditions precedent enumerated in said policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against defendant, United States Fidelity and Guaranty Company to recover the sum of $5116.89 . . ." No clearer language could have been used to evidence appellee's theory—that she sought to recover under the terms of the policy. At the time of filing these complaints on June 2nd, 1939, appellee knew of the terms and conditions and exclusion provisions of the policy

as appellant had furnished her counsel on August 4, 1937, with a photostatic copy of its daily report (R. 22, 123), which admittedly was a duplicate copy of the terms, conditions and exclusion provisions of the policy. (R. 123, 130, 170, 171)

The decision in the case of *Conley vs. United States Fidelity & Guaranty Co.,* 98 Mont. 31, 37 Pac. 2d 565. is authority for appellant's contention that the Doheny girls were not parties to the contractor's public liability policy, and that that policy was not made expressly for their benefit, within the provisions of Section 7472, Revised Codes of Montana, 1935, which declares:

> "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it."

There is no question but that the policy was made expressly for the benefit of the class of persons to which the Doheny girls belonged, and the appellee here can obtain the benefit of this policy only if she can bring the unsatisfied state court judgments within the terms of it.

> Adams vs. Maryland Casualty Co. 139 So. 453 (Miss.).
> Conley vs. United States Fidelity & Guaranty Co., 98 Mont. 31, 37 Pac. (2d) 565.

The appellant, as the insurer in these cases stands squarely upon the policy issued by it. It denies that there is any liability thereunder for the unsatisfied judgments against Coverdale & Johnson. The appel-

lee, as administratrix, from the very moment that a cause of action arose in her favor against Coverdale & Johnson stood in the same position as Coverdale & Johnson as respects the policy and was entitled to equal rights with Coverdale & Johnson thereunder, but no greater rights. She cannot now recover under this policy unless Coverdale & Johnson could have recovered had they paid the judgments.

Sun Indemnity Co. vs. Dulaney, 89 S.W.2d 307 (Ky.)

This rule is clearly stated in *Neilson vs. American Liability Insurance Co.,* 168 Atla. 436 (N. J.) as follows:

> "One who is not a party to a contract but for whose protection a policy provides, can stand only upon the terms of the contract, and if he does not bring himself within its terms there is no liability in his favor," citing Adams vs. Maryland Casualty Co., 139 So. 453, a 1932 Mississippi decision.

It cannot be questioned that if Coverdale & Johnson had paid the state court judgments, no recovery from appellant as insurer could be had by them.

CONCLUSION

In conclusion, the appellant respectfully submits that under the pleadings, facts and evidence in the cases at hand, and under the authority of the cases above cited:

1. That there is no liability on the part of the appellant by reason of having executed the contract performance bond.

2. That the highway contract, the contract performance bond, and the Contractor's Public Liability Policy cannot be construed together and thus change the appellant's liability under the terms of the Contractor's Public Liability Policy.

3. That the policy provisions, including the exclusion provisions, are applicable, operative and controlling and that the appellee failed to prove that the unsatisfied state court judgments were covered by the policy.

4. That there is no pleading, evidence or proof upon which a reformation can be granted.

For these reasons we respectfully submit that the judgment of the trial court in the cases at bar should be reversed.

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